

REMARKS

Claims 1-10 remain pending in the instant application and stand ready for further action on the merits. The instant reply is in response to the Non-Final Office Action mailed on September 30, 2008.

Pending claims 1-10 considered together with the following remarks are believed sufficient to place the application into condition for allowance. Accordingly, an early and favorable action on the merits is earnestly solicited at present.

Rejection on the ground of provisional double patenting

Claims 1-10 of the present application are provisionally rejected on the ground of non-statutory obviousness-type double patenting as being unpatentable over claims 1-5 of copending Application No. 10/592,523 (see pages 2-3 of the Office Action).

Reconsideration and withdrawal of the above rejection is respectfully requested based on the following considerations.

In response, Applicants co-file herewith a Terminal Disclaimer over copending Application No. 10/592,523.

In legal principle, the filing of a Terminal Disclaimer simply serves the statutory function of removing the rejection of obviousness-type double patenting, and does not raise a presumption on the merits of the rejection. It is improper to view the simple expedient of "obviation" as an admission or acquiescence on the merits. *Ortho Pharmaceutical Corp. v. Smith*, 22 USPQ2d 1119, 1124 (Fed. Cir. 1992) citing *Quad Envtl. Technologies Corp. v. Union Sanitary Dist.*, 946 F.2d 870, 874, 20 USPQ2d 1392, 1394-95 (Fed. Cir. 1991).

CONCLUSION

In view of the above amendment, applicant believes the pending application is in condition for allowance.

Should there be any outstanding matters that need to be resolved in the present application, the Examiner is respectfully requested to contact Eggerton A. Campbell, Reg. No. 51,307, at the telephone number of the undersigned below, to conduct an interview in an effort to expedite prosecution in connection with the present application.

If necessary, the Commissioner is hereby authorized in this, concurrent, and future replies to charge payment or credit any overpayment to Deposit Account No. 02-2448 for any additional fees required under 37.C.F.R. §§1.16 or 1.17; particularly, extension of time fees.

Dated: **DEC 24 2008**

Respectfully submitted,

By 

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